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82-477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

H.J.T. HERZOG,

Petitioner,

vs.

DAYTON BAR ASSOCIATION, and,
LEONARD STERN – OHIO STATE BAR
ASSOCIATION DISCIPLINARY COUNSEL,

Relators.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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STATEMENT OF QUESTIONS PRESENTED

1. Disciplinary Rule 2-103 (A) of the Ohio Code of Professional Responsibility for attorneys, as applied in this case, contravenes the United States Constitution, First Amendment.

2. Section 7 of Ohio Rule V for the Government of the Bar contravenes the Equal Protection Clause of the 14th Amendment to the United States Constitution.

3. Section 7 of Ohio Rule V for the Government of the Bar contravenes the Due Process of Law Clause of the 14th Amendment to the United States Constitution.

4. Section 7 of Ohio Rule V for the Government of the Bar is illegal as applied to petitioner in that it works the corruption of a Bill of Attainder against him.

5. Section 7 of Ohio Rule V for the Government of the Bar is illegal in that it applies an ex post facto law against the petitioner in contravention of the United States Constitution.

6. Section 7 of Ohio Rule V for the Government of the Bar contravenes the Double Jeopardy provision of the 5th Amendment to the United States Constitution.

TABLE OF CONTENTS

ITEM	page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATION TO OPINION BELOW	1
JURISDUCTIONAL GROUNDS	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE AND FACTS (showing how the questions here under consideration were dealt with in the state court)	3
REASONS FOR GRANTING THE WRIT	5
ARGUMENT	6
CONCLUSION	15

APPENDICES

A. OHIO SUPREME COURT OPINION	1a- 4a
B. OPINION OF THE BOARD OF COMMISSIONERS	5a-16a
C. OHIO SUPREME COURT JUDGMENT	16a-19a
D. NOTICE OF APPEAL (PETITION)	20a-22a

TABLE OF AUTHORITIES

CASES CITED	page
Atkinson v. Trustees, 559 SW2d 473 (1977)	9
Attwell v. Nichols, 466 F Supp 206 (D.C. Ga. 1979)	9
Bates v. Arizona Bar, 433 US 350 (1977)	6, 7
Benbol v. Carroll, 494 F Supp 462 (W.D. Ky. 1977)	11
Bigelow v. Virginia, 421 US 809 (1975)	6
Bishop v. Bar Committee, 521 F. Supp 1219 (S.D. Iowa 1981)	7
Chareton v. FTC, 543 F2d 903 (D.C. Cir. 1976)	13
Crain v. Mountain Home, 611 F2d 726 (8th Cir. 1979)	11
Cummings v. Missouri, 71 US 277 (1866)	11, 12
Dayton Bar Association v. Herzog, 70 O. St. 2d 261 (1982)	1
Durham v. Brock, 498 F Supp 213 (M.D. Tenn. 1980)	7
E. F. Hutton v. Anderson, 596 P2d 413 (Colo. 1979)	14
Erdmann v. Stevens, 458 F2d 1205 2d Cir. 1972)	13, 14
Fletcher v. Peck, 10 US 87 (1810)	11
In re Madsen, 68 Ill. 2d 472 (1977)	7
In re Primus, 436 US 412 (1978)	6
In re RMJ, 102 Sup. Ct. 929 (1982)	7
In re Ruffalo, 390 US 544 (1968)	14

Page

Jacoby v. California Bar, 138 Calif. Rptr. 77 (1977) .. 7

Koffler v. Joint Bar, 412 NE2d 927 (1980) 7

Kentucky Bar Association v. Stuart, 568 SW2d 933 (1978) 7

Lenske v. Sercombe, 266 F Supp 669 (D. Ore. 1967) .. 9

Ohralik v. Ohio Bar, 436 US 447 (1978) 8

Paine v. University of Texas, 355 F Supp 199 (D.C. Texas 1972) 14

Taylor v. Gray, 375 F Supp 790 (D.C. Wisconsin 1974) 14

United States v. Brown, 381 US 437 (1965) 11

United States v. La Franca, 282 US 568 (1931) 14

United States vs. Lovett, 328 US 303 (1946) 11

(other than case authorities)

United States Constitution, Article 1, section 10 .. 3, 11, 13

United States Constitution, 5th Amendment 3, 14, 15

United States Constitution, 1st Amendment 2, 6, 14

United States Constitution, 14th Amendment 2, 13

28 USC 2101 (c) 1

28 USC 1257 (3) 2

United States Supreme Court Rule 20 (2) 1

Ohio Rule for Government of the Bar V, section 7 ..... 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15

Ohio Disciplinary Rule 2-103 (A) 2

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CITATION TO OPINION BELOW

The Ohio Supreme Court opinion is reported at *Dayton Bar Association et al.* v. *Herzog*, 70 O. St. 2d 261 (1982), here attached as appendix A.

JURISDICTIONAL GROUNDS

The judgment of the Ohio Supreme Court was entered June 23, 1982. A petition for stay is pending in that Court. Notice of Appeal (petition) was filed August 5, 1982, *see*, 28 USC 2101 (c), Supreme Court Rule 20 (2).

Jurisdiction is invoked per 28 USC 1257 (3) in that petitioner was deprived of rights secured to him by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Disciplinary Rule 2-103 (A) of the Ohio Canons of Ethics:

> "A lawyer shall not recommend employment . . . of himself . . . to a non-lawyer who has not sought his advice. . . ."

2. Ohio Rule V for the Government of the Bar, section 7:

> "Effect of Discipline: . . . A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. . . ."

3. UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws. . . ."

4. UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN:

> "No state shall . . . deprive any person of . . . property without due process of law. . . ."

5. UNITED STATES CONSTITUTION, AMENDMENT ONE:

> "Congress shall make no law . . . abridging freedom of speech. . . ."

6. UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10:

"No state shall . . . pass any Bill of Attainder. . . ."

7. UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10:

"No state shall . . . pass any . . . ex post facto law. . . ."

8. UNITED STATES CONSTITUTION, AMENDMENT FIVE:

"No person shall be . . . subject for the same offense to be twice put in jeopardy. . . ."

STATEMENT OF THE CASE AND FACTS

Relators filed complaints against petitioner with the Ohio Supreme Court's Board of Commissioners on Discipline and Grievances April 13, 1981 and oral hearing before a three member panel of the Board (three practicing attorneys chosen by the Supreme Court) was held November 5 and 6, 1981 after which a recommendation to the Ohio Supreme Court was filed January 29, 1982. Thereafter, briefs were filed and argument had in the Ohio Supreme Court. Four charges of violations of the canons of professional ethics had been filed against petitioner: failure to pay funds promptly to a client, of which he was found guilty; neglecting a legal matter, of which he was found guilty; soliciting professional employment, of which he was found guilty; and, a fourth charge, not relevant here, of which he was found not guilty.

The Board of Commissioners and the Supreme Court of Ohio were both of the opinion that had this been peti-

tioner's first disciplinary offense, proper punishment would have been a one year suspension from the practice, considerably less severe than permanent disbarment; however, since petitioner had been once before, in 1962, indefinitely suspended from practice in Ohio (also for solicitation of legal business, an apparent victim at that time of insufficiently developed federal first amendment doctrine, *see, Dayton Bar Association* v. *Herzog*, 173 O. St. 313 (1962)), the Board recommended, and the Supreme Court of Ohio agreed, that punishmet be raised to permanent disbarment. This was allegedly required by the terms of Ohio Rule V for the Government of the Bar, section 7, which mandates stricter punishments in subsequent disciplinary proceedings for Ohio lawyers with no consideration whatever to how such a Rule may lead to injustice under the circumstances of particular cases.

One of the counts of which petitioner was found guilty had to do with direct mail solicitation of legal business, and apparently because of recent decisions of this Federal Supreme Court, the Ohio Court attempted to explain away the harsh penalty given petitioner in a lengthly footnote to its opinion, *see,* Appendix A, by explaining that even without the Federal First Amendment implications of the direct mail solicitation charge, it could have disbarred petitioner on only the two remaining counts of which he was found guilty anyway. In plain English, although the Ohio Court admitted that had this been a first time before the Displinary Board, petitioner would have received only a one year suspension if guilty of three counts, the Court was able to place its disbarment of him on the basis of only two lesser counts, again all because of the peculiarly harsh section 7 of Rule V for the Bar's Government.

Although the file of this case is particularly volumninous,

and petitioner personally and his retained counsel presented many arguments to the Ohio Supreme Court, nothing availed in the face of manifest Federal Constitutional anomalies in the Ohio Procedure. Only scrupulous review by this Court will protect petitioner and all other Ohio attorneys similarly situated from manifest misapplication of Federal Constitutional doctrine to their clear detriment.

REASONS FOR GRANTING THE WRIT IN THIS CASE

1. The Ohio Supreme Court has virtually admitted to deciding a federal question in a way which directly conflicts with decisions of other state courts of last resort and federal courts on the very same subject, *see,* ARGUMENT A, *infra,* and, APPENDIX A.

2. The Ohio Supreme Court has virtually admitted to deciding a federal question in a way which conflicts with very recent decisions of this Court, *see,* ARGUMENT A, *infra,* and, APPENDIX A.

3. It is manifest and indisputable that the manner in which the Ohio Supreme Court applies its section 7 of Rule V for the Government of the Bar clearly and on the face of the procedure: denies petitioner the equal protection of the laws; denies the petitioner due process of law; works the corruption of a Bill of Attainder against petitioner and all others similarly situated; applies an ex post facto law against petitioner; and, manifestly violates on its face the right of petitioner not to be placed twice in jeopardy for one and the same offense. *See,* ARGUMENTS B, C, D, E AND F, *infra,* and the clearly applicable authorities pointed out therein.

THE ARGUMENTS FOR THE WRIT

A. DISCIPLINARY ACTION ON THE FOURTH CHARGE AGAINST PETITIONER IMPERMISSIBLY CONTRAVENES THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION.

Factually, petitioner admits, with regard to one of the charges upon which his disbarment was based, that he did solicit clients by direct mail. Thus, no factual dispute is presented; but, petitioner's Federal First Amendment rights are violated by such action. The Ohio Supreme Court action not only contravenes decisions of other state courts of last resort on this issue, but, more importantly, clearly contravenes recent decisions of this Court on the exact same issue and thus cannot stand.

First, the view of this Court. Commercial speech has First Amendment protection, *Bigelow* v. *Virginia*, 421 US 809 (1975), and this protection applies to the right of attorneys to advertise, *Bates* v. *Arizona Bar*, 433 US 350 (1977) (where all of the justices rejected the view that lawyer advertising has an inherent tendency to mislead the public). A lawyer may not be disciplined for contacting a non-client by letter regarding possible legal remedies, *In re Primus*, 436 US 412 (1978). Chimerical fears do not justify proscription. Rules regarding solicitation must be narrowly drawn. Mere potential for conflict or over-reaching does not justify interference with First Amendment activity. Time, place and manner solicitation regulation is permitted under the Constitution if the aim is to prohibit that which is *in fact* misleading, deceptive, overbearing or improper, *In re Primus*, *supra*, pp. 437-438. The attorney need not justify his use of free speech; the bar association or court must justify its

curtailment. In the most recent decision in this area, *In re RMJ*, 102 S. Ct. 929 (1982), even the sole dissenting justice in *In re Primus* was brought around, apparently, to the view that the full panoply of First Amendment protections apply to attorneys. Again, petitioner in no way denies here that he solicited clients by direct mail. He asserts a right to do so, and this Court's most recent pronouncements protect that right. The Ohio Supreme Court's decision here directly contravenes the most recent rulings of this Court on this most important federal issue.

The Ohio Court's decision here also contravenes the decisions of sister state supreme courts on the Federal First Amendment question, viz., California in *Jacoby* v. *California Bar*, 138 Calif. Rptr. 77 (1977); Illinois in *In re Madsen*, 68 Ill. 2d 472 (1977) (where the Court noted that *Bates, supra*, has probably outlawed attorney discipline for direct mail advertising or soliciting); esteemed Kentucky in *Kentucky State Bar Association* v. *Stuart*, 568 SW2d 933 (1978) (Unanimous decision: "In all advertising there is the potential for deception and over-reaching statements. The fact that an advertisement is in the form of a letter does not increase the liklihood of these evils. . . .", *Stuart, supra*, p.934); New York in *Koffler* v. *Joint Bar*, 412 NE 2d 927 (1980) (unanimous decision: "Direct mail solicitation of potential clients by lawyers is constitutionally protected speech which may be regulated but not proscribed," *Koffler, supra*, p.929). Minnesota has reached the same result. *See also, Bishop* v. *Bar Committee*, 521 F. Supp. 1219 (S.D. Iowa 1981), *Durham* v. *Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980). "The handwriting is on the wall." Lawyer direct mail solicitation can be proscribed only when *in fact* deceptive or misleading. *See generally*, "Birth of a Salesman: Lawyer Advertising and Solicitation," Lori B. Andrews. ABA Press,

1981. (In anticipation, should the state cite the case, *Ohralik* v. *Ohio Bar*, 436 US 477 (1978) has nothing to do with any matters raised in this petition.)

A SPECIAL NOTE REGARDING "ARGUMENT A"

It should not escape the attention of this Court that section 7 of Ohio Rule V for the Government of the Bar, upon which petitioner's disbarment was based is particularly pernicious in its effect upon the First Amendment in this particular case. The reason for this is that, as will be argued extensively, *infra*, Rule V, section 7 substantially increases penalties in Ohio for attorneys who are disciplined on more than one occasion, as was your petitioner; however, the prior disciplinary matter (in 1962) also had to do with solicitation of legal business — a situation for which petitioner in all probability could not be, under the First Amendment, disciplined today. Thus, in addition to the other infirmities of Rule V, section 7 discussed *infra*, the manner of application of that Rule in this particular case has the effect of further exacerbating the most severe sanctions and penalties because of nothing more than petitioner's long term dedication to First Amendment philosophy and principles. Indeed, for this reason alone the Rule V, section 7 Bill of Attainder is particularly vindictive and harsh, unconstitutionally so, in this case.

B. OHIO RULE V, SECTION 7 CONTRAVENES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The equal protection clause of the Federal Constitution forbids regulations which regulate or forbid the practice of law without rational connection to one's ability or fitness therefore, *Attwell* v. *Nichols,* 466 F. Supp. 206 (D.C. Ga. 1979), and the Supreme Court will carefully review state disbarment orders where it is substantially alleged that the equal protection clause has been violated, *Lenske* v. *Sercombe,* 266 F. Supp. 669 (D.C. Oregon 1967). Equal protection, for example, has been held violated by a rule which forbade law professors to practice law, *Atkinson* v. *Trustees,* 559 SW2d 473 (Ark. 1977).

In this case, petitioner had four charges against him, was found not guilty of one, and guilty on another with serious First Amendment implications, and guilty of two others of a rather minor nature. Yet, his punishment, under the Ohio rules, had to be raised from a one year suspension, an admittedly fair (from the Bar Association's point of view) sanction, to the ultimate penalty, disbarment, due to Governing Rule V, section 7, which provides that:

> "A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct."

Due to the above Rule, since he had been disciplined thirteen years before, also for interpreting the First Amendment liberally, petitioner's sanction was raised from one year suspension to the harsh ultimate penalty. He was

punished as if he were a habitual criminal, when he is only a habitual attorney. When reinstated in 1975, nonetheless, petitioner was not reinstated, on a fair interpretation, as a "tainted, second class" attorney, but to all rights and privileges appurtenant to the office. He either became a full-fledged attorney again or he did not; if not, he should not have been reinstated. The equal protection clause tolerates no second class citizens; yet, the operation of Rule V, section 7 was to reinstate petitioner as a second class attorney – one "tainted" with a prior history of First Amendment zeal whose "number" was not a lucky one to have. Although it may have been approaching rather slowly, he was clearly placed in the path of the train oncoming. Yet, surely the equal protection clause tolerates no state-created "second-class lawyers" no more than second-class citizens. Surely, all lawyers allowed to practice must at all times be governed and sanctioned by the same standards; otherwise, we have some lawyers who are, in Orweil-like fashion, more equal than others – namely, those lucky ones who have yet to be disciplined for the first time. And what strangely arbitrary results can arise under Rule V, section 7: a lawyer being disciplined the second time for neglecting a traffic ticket can be punished more severely than one being disciplined the first time for neglecting a capital case. This is bizarre, absurd, irrational on its face and manifestly unfair.

C. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR IS A BILL OF ATTAINDER.

No state shall pass any Bill of Attainder, Article I, section 10, United States Constitution. Such a Bill is a legislative act inflicting punishment without trial; if the penalty be less than death, it is called a "Bill of Pains and Penalties," but both are encompassed in the Constitutional prohibition. The essence of these Bills is that guilt and the need for punishment are simply assumed and certain persons or groups are "attainted" with the stigma desired, *Cummings* v. *Missouri*, 71 US 277 (1866). It cannot be reasonably denied that the Ohio Supreme Court acts legislatively when it promulgates rules for the government of the bar. Rule V, section 7 is a Bill of Attainder. Such a Bill may affect life or property, *Fletcher* v. *Peck*, 10 US 87 (1810). Statutory enactments punishing defined individuals without benefit of trial is exactly what a Bill of Attainder is, *US* v. *Brown*, 381 US 437 (1965). *Benbol* v. *Carroll*, 494 F. Supp. 462 (W.D.Ky. 1977), *Crain* v. *Mountain Home*, 611 F2d 726 (8th Cir. 1979), *US* v. *Lovett*, 328 US 303 (1946), (cases dealing with attainted attorneys, communists, labor leaders, public employees, and other "second class" persons).

When it promulgated Rule V, section 7, the Ohio Supreme Court legislatively enacted a law condemning without trial a class of persons, lawyers who had been previously disciplined, to punishment greater than others would receive for the same conduct. Even under well recognized "habitual offender" statutes, the accused gets a trial by jury if he wishes: not so Ohio attorneys. Herzog was given a trial on the four charges actually placed against him, found not guilty of one, and just punishment for

the others reckoned to be a year suspension; however, a special law for his benefit, a Bill of Attainder, had been enacted, so his punishment was increased. Naturally, under the Ohio scheme, he had no trial on the "increase": that was free.

D. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR IS AN EX POST FACTO LAW AS APPLIED TO THE FACTS OF THE PRESENT CASE.

No state shall enact an ex post facto law, Federal Constitution, Article I, section 10.

> "An ex post facto law is one which imposes punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required," *Cummings* v. *Missouri*, 71 US 277 (1866 - syllabus 3).

There are clearly three kinds of ex post facto law in the above scheme. Section 7, Rule V contravenes all. Firstly, Herzog's reinstatement to the bar in 1975 was not punishable by the Ohio Supreme Court at that time, obviously, or he would not have been re-admitted, but the present case dealt to him a punishment because he had been re-admitted, albeit as a "tainted, second class lawyer." Secondly, the proper punishment for Herzog in this case was always admitted to be a year suspension, yet the harsher, disbarment, was added pursuant to the section 7, Rule V Bill of Attainder. Thirdly, less testimony was certainly used to disbar him in 1982 (namely, *none*) than was needed to suspend him in 1962 or to suspend him for

a year in 1982. All three tests of the ex post facto law are thus met and your petitioner is the victim.

E. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

A license to practice law is a right (in property) which, once given, cannot be capriciously taken away: withdrawal of this right should only be exercised in clear cases of misconduct which affect the standing and character of the party qua lawyer, *Chareton* v. *FTC*, 543 F2d 903 (D.C. Cir. 1976). Although wide discretion is allowed states in attorney discipline, they may not behave arbitrarily with regard to attorneys, nor capriciously deprive them of the means to a livlihood, *Erdmann* v. *Stevens*, 458 F2d 1205 (2d Cir. 1972).

In Ohio, section 7, Rule V for the Government of the Bar automatically mandates stricter punishment for attorneys who are disciplined for the second time, regardless of any merit to differences between individual cases and regardless of any substantive difference in the relative seriousness even of the first and second offenses as compared not only to offenses committed by other attorneys similarly situated, but as weighed judgmentally with each other. Such a scheme is patently irrational on its face, so utterly repugnant to all concepts of fundamental fairness now rooted firmly in our jurisprudential system as to clearly, if used, deprive one of the due process of law guaranteed by the Fourth Amendment.

F. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR, AS APPLIED IN THIS CASE, CONTRAVENES THE PROHIBITION AGAINST DOUBLE JEOPARDY CONTAINED IN THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It is clear that disbarment proceedings are adverserial and quasi criminal in nature since they impose a substantial penalty on the lawyer, *In re Ruffalo*, 390 US 544 (1968). Such proceedings are comparable to criminal, not civil, proceedings, *Erdmann* v. *Stevens, supra,* and, even some civil matters which are basically punitive in character are barred (by the double jeopardy clause) by prior criminal conviction for the same offense, *US* v. *LaFranca*, 282 US 568 (1931). So-called "quasi-criminal" matters, such as attorney disciplinary proceedings, are clearly governed by the requirements of the double jeopardy clause, *E. F. Hutton and Company* v. *Anderson*, 596 P2d 413 (Colo. 1979). Multiple punishments for the same offense are not allowed, *Taylor* v. *Gray*, 375 F. Supp. 790 (D.C. Wis. 1974), and punitive "type" sanctions, successively imposed, are prohibited, *Paine* v. *University of Texas*, 355 F. Supp. 199 (D.C. Texas 1972).

Section 7, Rule V is contrary to the above mandatory constitutional standards in the following particulars. Your petitioner was indefinitely suspended from the practice of law in Ohio in 1962 for soliciting legal business in a manner which would be protected by modern First Amendment doctrine. Nonetheless, he remained suspended for thirteen years and was reinstated in 1975. In 1982, having been found guilty again he was, according to the Ohio Supreme Court, deserving of a one year suspension; however, due to prior discipline, his punishment was increased to the ultimate penalty for a lawyer. More precisely:

for his 1982 direct mail petitioner was given a one year suspension (first in jeopardy); then (due to the arbitrary operation of section 7, Rule V), *for his 1982 direct mail* petitioner was disbarred permanently (second in jeopardy *and* punished secondly and more). It is clear that petitioner has been the victim of contravention of one of the most sacred principles of our criminal law: "No person shall be . . . subject for the same offense to be twice put in jeopardy. . . .", Federal Constitution, Amendment Five.

CONCLUSION

It is manifestly clear that the Writ should issue because the Ohio Supreme Court has: interpreted federal law differently than this Court: interpreted federal law differently than other state supreme courts: clearly violated several federal constitutional guarantees of your petitioner.

RESPECTFULLY SUBMITTED.

HERBERT CREECH, JR.,
ESQUIRE OF THE OHIO BAR.